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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20545

FILE: B-191344

DATE: September 18, 1978

MATTER OF: Juno Construction Corporation
M.G. Slivka, Inc.

DIGEST: Joseph Morton Company, Inc.
Argonaut Insurance Company

1. Court order, dismissing with prejudice protester's complaint for injunctive relief pending GAO resolution of protest, is final adjudication on merits precluding GAO consideration of protest.
2. Protest from defaulted contractor's surety concerning agency's failure to award reprocurment contract to low offeror will not be considered as surety is not interested party under GAO Bid Protest Procedures since surety's sole interest in matter is its responsibility for excess reprocurment costs, which is for resolution by agency Board of Contract Appeals.

Juno Construction Corporation (Juno), M.G. Slivka, Inc. (Slivka), Joseph Morton Company, Inc. (Morton) and Argonaut Insurance Company (Argonaut) protest the General Services Administration's (GSA) award of a negotiated reprocurment contract to Shore Air Conditioning Company, Inc. (Shore) for miscellaneous repairs and alterations to the United States Court House, Foley Square, New York, New York.

On May 17, 1977 GSA default terminated Morton's \$3,234,470 contract for modernization and alteration of the Court House. Morton thereafter appealed the termination to the GSA Board of Contract Appeals. Subsequent to termination GSA afforded Argonaut, Morton's surety, an opportunity to complete the terminated contract. Argonaut by letter of July 19, 1977 declined GSA's offer and instead proposed that GSA accept one of three bids which Argonaut had solicited and forwarded as enclosures to the July 19, 1977

letter. Of the three bids, one was tendered by Juno (bidding as Main Power & Electric Wiring) while another was tendered by Slivka. Both Juno and Slivka had been subcontractors to Morton under the terminated contract. GSA found it could not accept any of the three bids and by letter of July 22, 1977 advised Argonaut that the Government would itself solicit offers for the completion of the terminated contract.

GSA issued the negotiated reprocurement solicitation on September 20, 1977 to seven firms. Offers were received on October 11, 1977 from five of the firms in the following amounts:

Juno	\$ 44,958
Slivka	\$ 48,800
Shore	\$349,900
S. Puma Co., Inc. (Puma)	\$400,000
PJR Construction Corp. (PJR)	\$467,000

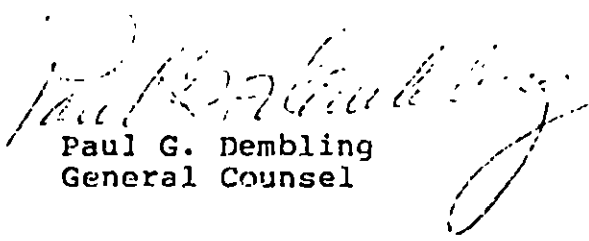
GSA accepted Shore's offer on February 14, 1978.

We have received protests from Juno, Slivka, Morton, and Argonaut. Juno and Slivka each claimed to be the low offeror entitled to award. The gist of Morton's protest is that GSA improperly denied Morton an opportunity to compete for the award of the reprocurement contract. Argonaut protests GSA's failure to accept one of the low offers because "it does not wish to be held responsible for unreasonable and excessive alleged completion costs."

We will not consider any of the protests. Juno and Slivka both have failed to express a continued interest in having our Office decide the merits of their respective protests. Consideration of Morton's protest is foreclosed by the action it filed in the United States District Court, District of Columbia, alleging that GSA had violated applicable procurement regulations and seeking both a temporary restraining order and a preliminary injunction, restraining and enjoining the Government from permitting Shore to perform the completion contract until this office had rendered a decision on the case. On May 11, 1978,

after a March 9, 1978 hearing on the motion for a temporary restraining order, the Court dismissed the entire case with prejudice. Such a dismissal operates as a final adjudication on the merits. Military Base Management of New Jersey, Incorporated, B-179872, January 22, 1974, 74-1 CPD 22. We do not consider protests where the material issues have been the subject of judicial decision. 4 C.F.R. 20.10 (1978); City and County of San Francisco, B-188130, March 30, 1978, 78-1 CPD 245; Pullman Standard, Inc.--Reconsideration, B-190254, January 11, 1978, 78-1 CPD 22

Argonaut's protest involves only its obligation, as surety, to pay excess reprocurement costs. This is a matter for decision by the GSA Board of Contract Appeals, rather than this Office. Hemet Valley Flying Service, Inc., B-191922, August 14, 1978, 57 Comp. Gen. ___, 78-2 CPD ___. Although in the cited case we considered a protest from a would-be participant in a reprocurement even though it raised "inferentially" the question of the reasonableness of the cost of reprocurement, we did so because the central issue raised was whether applicable procurement procedures had been followed. In this case, we do not view Argonaut, the defaulted contractor, ety, as an interested party under our Bid Protes. Procedures, see 4 C.F.R. 20.1(a), which can raise that issue.


Paul G. Dembling
General Counsel